No. 92-1168

In The

Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
WILLIAM J. SMITH
2547 W. Shaw Ave.
Suite 112
Fresno, CA 93711
(209) 221-1484
(209) 221-1487 (fax)

MARGARET A. HARRIS
Counsel of Record
KATHERINE L. BUTLER
3223 Smith, Suite 308
Houston, TX 77006
(713) 526-5677
(713) 526-5691 (fax)

Counsel for Amicus Curiae The National Employment Lawyers Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 92-1168

In The

Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a national bar association of over 1500 lawyers who regularly represent employees in employment-related disputes. NELA members thus represent many victims of sexual harassment.

NELA has a compelling interest in ensuring that Title VII's goal of eradicating employment discrimination is fully realized. It thus submits this brief because of the importance of the issues at bar to furthering this goal.

The written consents of all parties have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify the proper standards for analyzing sex-based job harassment. NELA proposes that the Court reject the Sixth Circuit's requirement that severe psychological injury serve as a necessary component to establish liability under Title VII. This requirement accords with neither Title VII nor this Court's earlier opinion in *Meritor Savings, FSB v. Vinson*, 477 U.S. 57 (1986).

In its place, NELA proposes a standard that views the harassment from the perspective of a reasonable woman and leaves assessment of the psychological injury caused by the harassment to the damages – rather than liability – inquiry. In addition, NELA proposes a second subjective standard to be used in those limited cases in which a woman informs her employer of a specific sensitivity to sex-based harassment and the employer fails to make reasonable accommodations.

NELA also proposes a standard for determining whether constructive discharge has occurred that, unlike the precedent of the Sixth Circuit, does not limit the relief provided in Title VII only to those few women who are superhuman – or desperate – enough to continue working in a hostile working environment that a reasonable woman would leave.

Finally, NELA briefly addresses potential First Amendment concerns about limiting the speech of sexual harassers in the event this Court decides to consider this issue.

ARGUMENT

I. This Court should strongly disavow the Sixth Circuit's Decision in *Rabidue v. Osceola Refining Co.*

The Court's first duty in this case is to so strongly disavow *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), that, in the future, this opinion is cited only in the same context that one might cite *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("colored" railroad passengers could be compelled to accept "separate but equal" accommodations) and *Bradwell v. State*, 16 Wall. 130 (1873) (women are not "persons" who have the right to practice law).

A. The Sixth Circuit's legal reasoning in *Rabidue* is seriously flawed.

In *Rabidue* – a decision on which the lower court in *Harris* heavily relied, the Sixth Circuit found that, even though the plaintiff proved, among other objectionable conduct, that a male supervisor called women "whores," "cunt," "pussy," and "tits," she did not prove that her work environment was sufficiently hostile to establish a claim under Title VII.[1] Several serious flaws mark this shocking opinion. First, the *Rabidue* court would require a plaintiff to show severe psychological injury as a threshold for liability. 805 F.2d at 624. Second, the *Rabidue* majority blithely ignored the remedial purpose of Title VII and instead ruled that, because boys will be boys, the

[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq*.

status quo precluded liability in a hostile work environment case of sexual harassment.

1. Proof of severe psychological injury has no place in a liability determination.

The first flaw in the *Rabidue* decision – and the issue on which this Court granted certiorari – is that its majority essentially put the cart before the horse. The initial question posed in most civil cases is whether a defendant is liable to a plaintiff. The *Rabidue* majority and its followers, however, wish to first examine the plaintiff's wounds to ascertain whether the damages are serious enough to warrant the court's attention. This requirement, which has no precedent in other personal injury actions, could, if extended beyond Title VII, absurdly provide that only victims who are severely injured in an automobile accident can recover damages from the drunk driver who caused the accident.[2]

This particular flaw of *Rabidue* – its requirement that a victim demonstrate "serious psychological injury" before liability can be found – is persuasively refuted in the Petitioner's brief, as well as in the amici briefs of, for

---

[2] Once a violation of the law is established, then the court may turn its attention to damages and assess the extent and severity of the victim's reaction to the harassment. The person's injuries may be either minor or unexpectedly large. *See, e.g., Dulieu v. White*, 2 K.B. 669, 679 (1901) (a decision credited as the origin of the right of the "eggshell skull" plaintiff, *i.e.* one who suffers death where a normal person would have had only a bump on the head, to recover in damages so long as liability is established).

example, the Women's Legal Defense Fund and the NAACP Legal Defense and Education Fund, Inc. Because NELA believes that the rationale for rejecting this reasoning is cogently and aptly presented by the Petitioner and other amici, it does not write separately on this issue.

2. Acceptance of the status quo as a defense to a hostile work environment claim frustrates the goals of Title VII.

Rabidue's second flaw is that it accepts the status quo as a defense in hostile work environment cases.[3] In the *Rabidue* court's reasoning, the sexual epithets hurled at the women in the workplace, together with the concurrent display in the workplace of pictures of nude or semi-nude women, were merely a legitimate expression of the cultural norms of workers at the plant. *Id.* at 622. After observing that this was the prevailing atmosphere of the plant, where the plaintiff had voluntarily gone to work,[4]

---

[3] *Rabidue* is not alone in this "take the workplace as you find it" position. *See, e.g., Weinsheimer v. Rockwell International Corp.*, 754 F.Supp. 1559, 1561, 1566 (M.D. Fla. 1990) (requests by male co-worker that complainant "suck him" and "give him head" were "consistent with the general environment in the back shop" and not "sufficiently severe" to violate Title VII), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).

[4] Ignoring the economic realities that underlie a person's decision to accept employment, the *Rabidue* majority argues that the plaintiff, in effect, assumed the risk of working in a hostile environment by going to work in a male-dominated plant. The court thus suggests that the plaintiff could have elected to forego this employment opportunity – an economic choice that few women have in this society. The very fact that women occupy a subordinate position in the workforce, and thus have

the court ruled that the conduct of which she complained had only a "de minimis effect" on her work environment. *Id.* The court also thought it relevant to observe that, outside the workplace, the victim lives in a society that condones and commercially exploits "open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 627.

Title VII was not, however, designed to preserve the status quo – or to reward employers who maintain hostile working environments. Congress enacted this statute in 1964 because the workplace was fraught with discrimination in the fact, terms, and conditions of employment – a situation it declared should change. Clearly signalling the remedial purpose behind Title VII, Congress dictated that discrimination in the workplace on the basis of race, color, religion, national origin, or sex would no longer be tolerated. As the Third Circuit observed,

> [W]hile Title VII does not require that an employer fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private,

---

fewer options from which to select, is exactly what makes them more vulnerable to sexual harassment in the first place. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 40-47 (1979).

> as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3rd Cir. 1990) (*quoting Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).

B. *Rabidue* followed neither this Court's opinion in *Meritor* nor the EEOC Guidelines on Sexual Harassment.

In this Court's only prior opinion on the topic of sexual harassment in the workplace, *Meritor Savings, FSB v. Vinson*, 477 U.S. 57 (1986), the Court began with the observation that Congress passed Title VII with the affirmative intent to change the workplace – "to strike at the entire spectrum of disparate treatment of men and women in employment." *Id.* at 64 (*quoting Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Court also noted that it could "readily envision working environments . . . heavily polluted with discrimination." *Meritor*, 477 U.S. at 66 (*quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). The Court's vision was not, unfortunately, a figment of its imagination, but rather a recognition that, even though Title VII had been the law of the land for over twenty years, some employees were still forced to resort to the legal system to assert their right to "work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 66.

Nonetheless, the *Rabidue* majority chose to reject an opportunity to rid the workplace of blatant hostility

towards women. Rather than finding the employer at fault for failing to take measures to cleanse the atmosphere of the sexism that pervaded the workplace, the *Rabidue* majority found fault with the victim, who accepted employment in that environment and then had the nerve to complain about it.

The majority's opinion in *Rabidue* also departs from the recommendations of the Equal Employment Opportunity Commission (EEOC), which has since sharply criticized that opinion in its written guidelines regarding sexual harassment. EEOC Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Manual (BNA) 405:6691 (1990). Agreeing with Judge Keith, who dissented in *Rabidue*, the EEOC rejected the notion that the plaintiff "assume[d] the risk of harassment by voluntarily entering an abusive, anti-female environment" and reaffirmed that the goal of Title VII was to "prevent such behavior and attitudes from poisoning the work environment." *Id.* (*quoting Rabidue*, 805 F.2d at 626 (Keith, J., dissenting)).

This Court has previously deferred to the EEOC's guidelines and accepted the agency's interpretations of the law. *Meritor*, 477 U.S. at 65. In light of the remedial goal of Title VII, NELA urges that this Court once again take advantage of the EEOC's "body of experience and informed judgment" and expressly disavow the majority opinion in *Rabidue*.

C. The *Rabidue* majority also turned a blind eye to the real world of sexual harassment.

NELA members are often the first professionals to whom the victims of sexual harassment turn for assistance when their own coping skills prove insufficient to rectify a hostile working environment. Not surprisingly, our personal experiences as lawyers who represent victims of sexual harassment validate the observations of social scientists as to the pervasiveness of the problem – and as to the inability of many victims to remedy the problem on their own.

Like racial harassment, most incidents of sexual harassment lack any social value whatsoever.[5] Some forms of sexual harassment, however, involve behavior that could be welcome under certain circumstances.[6] For that reason (and because our society has yet to regard sexism with the same degree of abhorrence with which it regards racism), the courts – and members of our society – have, on occasion, grappled awkwardly with the issue. Obviously, given the various methods adopted by lower

---

[5] *See, e.g., Miller v. Bank of America*, 600 F.2d 211, 212 (9th Cir. 1979) (plaintiff's supervisor demanded sexual favors from her, referring to her as a "black chick"); *Gilardi v. Schroeder*, 833 F.2d 1226, 1228-1229 (7th Cir. 1987) (employer drugged the plaintiff and raped her while she was unconscious).

[6] Requests for dates and sexual flirtation in some circumstances are socially useful because they foster relationships between consenting individuals. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (the perpetrator could be portrayed as "a modern-day Cyrano de Bergerac wishing no more than to woo [the plaintiff] with his words").

courts to assess liability in sexual harassment cases, they are sorely in need of guidance from this Court.

Unlike racial harassment, sexual harassment runs the gauntlet from behavior that is obviously intolerable from any perspective to the grey areas that present situations that could be interpreted in various ways – depending on the perspective one uses to analyze them. They range from *quid pro quo* demands for sexual favors that offer, in return, continued employment (*see, e.g., Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1045 (3rd Cir. 1977) (continued employment conditioned upon submission to sexual advances)) – to physical assaults and offensive touching (*see, e.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1409-1410 (10th Cir. 1987) (one supervisor rubbed plaintiff's thigh, another touched her buttocks, grabbed her breasts, and deliberately fell on top of her)) – to sexist and denigrating generalizations about women (*Rabidue*, 805 F.2d at 615; *cf. Hazen Paper Co. v. Biggins*, slip op. at 7, 61 U.S.L.W. 4323 (U.S. April 20, 1993) (age discrimination)).

Numerous studies have shown that sexual harassment affects virtually all women. *See, e.g.*, NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES, A REPORT IN PROGRESS 9 (Nov. 1991). While many women quit their jobs because of sexual harassment, others continue to work, but suffer significant adverse physical and psychological effects. (*Id.* at 13-15). As noted in one of the early studies on the phenomena of sexual harassment, "Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF

WORKING WOMEN 47 (1979). The most common effects of sexual harassment that women defined in one study were fear, anger, anxiety, depression, self-questioning, and self-blaming. Mary P. Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS (M. Paludi ed., 1990). In fact, the American Psychiatric Association has recognized stress as a result of sexual harassment as a specific, diagnosable problem. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 11 (3d ed. 1987).

D. The majority opinion in *Rabidue* poisoned the lower courts' decisions in the instant case.

Without the precedence of *Rabidue*, the Petitioner would have prevailed in her sexual harassment claim. Teresa Harris, after all, proved to the satisfaction of the fact-finder that her supervisor, Charles Hardy, was "a vulgar man [who] demean[ed] the female employees at his work place," that he was "truly gross and offensive," that she was herself offended, and that his comments would "offend the reasonable woman." Magistrate's Report and Recommendation, *Harris v. Forklift Systems, Inc.*, No. 3:89-0557 (Nov. 27, 1990) (Pet. Writ at A-14, A-19). Nonetheless, based on the precedent set by *Rabidue* – the requirement that a plaintiff show that her psychological well-being was *seriously* affected by the hostile work environment before liability will attach – the fact-finder in the instant case concluded that the working environment was not "so poisoned as to be intimidating

or abusive" and that, despite the plaintiff's testimony, she was not "so offended that she suffered injury." Magistrate's Report, *supra* (Pet. Writ at A-19).

Under this Court's opinion in *Meritor* and the EEOC Guidelines, however, Teresa Harris would have prevailed. She proved, after all, that the workplace was "heavily polluted with discrimination" and that the atmosphere would have offended a reasonable woman. And, as this Court expressly recognized in *Meritor*, environments of this ilk are precisely what Congress determined to eliminate through passage of Title VII.

E. As rulings from other circuits reveal, many lower courts would benefit from this Court's adoption of a standard by which a claim of hostile working environment should be viewed.

The errors found in *Rabidue* are, unfortunately, not confined to opinions from the Sixth Circuit. The lower courts are divided on the proper standard by which to assess harassment cases under Title VII – whether the harassment is based on race or gender. Indeed, of the courts that have considered the issue, only the Eighth and Ninth Circuits have clearly recognized that the inquiry into psychological injury is a question of damages, not liability, in a sexual harassment case. *Compare Rabidue v. Osceola Refining Co., supra., with Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (employees need not endure sexual harassment until their psychological well-being is seriously affected) *and Burns v. McGregor Electronic Ind.*, 955 F.2d 559, 566 (8th Cir. 1992) (complaining party must show only that she was as affected as a reasonable person

would be in like circumstances). *See also Downes v. FAA*, 775 F.2d 288, 293 (Fed. Cir. 1985) (complaining party must show misconduct that caused either interference with her work *or* her own serious psychological injury).

The courts are likewise divided on the perspective from which to judge whether harassment has occurred – that is, whether the work environment will be assessed from the perspective of the reasonable man, the reasonable woman, or both. *Compare, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (man's and woman's perspective should be considered on the issue of unwelcomeness), *with Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990) (the question is whether the work environment would be offensive to women of reasonable sensibilities) *and Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (a reasonable person standard would not adequately consider the unique experiences of women workers).[7]

---

[7] The courts are also split on the question of whether the work environment should be considered in determining whether harassment has taken place. Some courts have held that the complaining woman's allegations of harassment and/or injury must be viewed in light of the work environment overall. *See, e.g., Reynolds v. Atlantic City Convention Center*, 1990 WL 267417, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1866 (D.N.J. 1990) (impact of obscene gestures and remarks must be discounted "in an atmosphere otherwise pervaded by obscenity"). Other courts have correctly held that traditional workplace norms have no bearing on a determination of whether a violation of Title VII has occurred. *See, e.g., Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) ("Work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile environment theory") (citing *Meritor*, 477 U.S. at 66)); *Andrews v. City of Philadelphia*, 895 F.2d

II. This court should adopt a standard by which lower courts may assess liability in hostile work environment cases that focuses on the perspective of the victim and entails both objective and subjective elements.

NELA proposes that this Court adopt a standard to be followed by the lower courts in assessing whether the facts of a particular sexual harassment claim prove that the hostile work environment of which the plaintiff complains violates Title VII. The standard, which should first assume that employers and their agents know the law,[8] must be assessed from the perspective of the victim of the allegedly offensive behavior. After all, as the Ninth Circuit observed:

> If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.

Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

The standard NELA proposes is two-pronged: first, would a reasonable woman generally view the complained-of sex-based harassment as sufficient to create a hostile work environment? If so, liability is established. If the answer to that question is "no," however, the inquiry does not end. In many instances, the victim may be particularly vulnerable to some forms of harassment – and the employer knows that. If this is indeed the case, and the employer has failed to reasonably accommodate the needs of this particular employee, liability is also established.

A. The first part of the standard assesses liability from the perspective of the victim vis-a-vis the reasonable woman.

NELA strongly believes that only a standard that is fashioned from the perspective of the victim will help eradicate impermissible sex-based harassment in the workplace. *Cf. Harris v. International Paper*, 765 F.Supp. 1509, 1516 (D. Me. 1991) (appropriate standard to be applied in a hostile racial environment case was that of a reasonable black person), *order amended*, 765 F.Supp. 1529 (D. Me. 1991). Numerous researchers, after all, have documented the fact that, when asked whether certain behavior or actions constitute sexual harassment, women are far more likely than men to define a situation as

---

1469, 1486 (3rd Cir. 1990) (an employer of both men and women is not unfairly burdened by a requirement that it prevent an atmosphere of sexism from pervading the workplace).

[8] While neither the language of Title VII itself nor the legislative history provides any guidance on the law of sexual harassment, guidelines published by the EEOC comprehensively define the duty of an employer to provide a workplace free of unlawful harassment. *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Empl. Prac. Manual (BNA) at 405:6681 (1990). This duty cannot be defined by reference to the "reasonable person in the actor's shoes;" rather, the perspective must be from the viewpoint of the person experiencing the conduct in question. *Id.* at 405:6689 (1990). An actor, after all, must be presumed to know the law. *See also* Restatement (Second) of Torts § 286.

harassing. *See* NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES, A REPORT IN PROGRESS 6 (Nov. 1991) (and sources cited therein).

This standard will, admittedly, prove more difficult for courts to apply than the traditional "reasonable person" (from the actor's perspective) tort standard. Despite the temptation to travel the familiar road, however, this Court must reject the argument that the existence of a hostile work environment should be measured from the perspective of the actor. The principle of a "reasonable man," after all, is based on an assumption that this hypothetical ideal person possesses the community's pre-existing good moral character and knows right from wrong. *Cf. Ellison*, 924 F.2d at 879 ("the reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women").

The rationale behind Title VII – that the workplace was sorely afflicted by the evils of discrimination and in dire need of change – reveals that the traditional inquiry into how the hypothetical reasonable actor would have acted is inappropriate. In the words of the Ninth Circuit, " 'Title VII is aimed at the consequences of effects of an employment practice and not at the . . . motivation' of co-workers or employers." *Id.* at 880 (*quoting Rogers v. EEOC*, 454 F.2d at 239, *also citing Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)) (absence of discriminatory intent does not redeem an otherwise unlawful employment practice)). Thus, regardless of the fact that many individuals in the workplace may hold racist and/or sexist beliefs, Congress has directed that those beliefs cannot be allowed to poison the workplace because they rob our

society of the benefits that could be achieved were our society to have the full participation of each individual.

While NELA certainly does not contend that all men believe that sex-based harassment is either reasonable or appropriate work behavior, NELA is acutely aware that numerous male-dominated industries still exist in the workplace – where women are often harassed because their presence in that environment is viewed as inappropriate. In these non-traditional work environments, sexual harassment of female employees, few in number, operates to drive those few women from the non-traditional workplace and to discourage others from working there. Likewise, as the instant case confirms, the hierarchical relationship between men and women that exists in other, more traditional, employment settings is the reality of most women's experience in the workplace, and often leads to the type of sex-based harassment that is based on a desire to assert power.

Only a standard that considers the viewpoint of the minority in the workplace can ever hope to improve it. Otherwise, as both *Rabidue* and the case at bar poignantly illustrate, if the perpetrator's perspective is the standard viewpoint from which the harassing behavior is assessed, the harassment will be characterized by the perpetrator – and the courts – as only joking behavior or a normal part of a rough and tumble workplace.[9] On the other hand,

---

[9] As in the present case, sexual harassment is often characterized as harmless joking by men. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L. J. 1177, 1199 & n.81, 1207-1208 & n.110 (and sources cited therein) (1990). Another researcher reports that the characteristically male view depicts sexual harassment as comparatively harmless amusement. Abrams,

were this Court to announce that, henceforth, all hostile work environment cases will be analyzed from the victim's perspective, employers would take their duty to rid the workplace of sex-based harassment much more seriously. And, as the EEOC has observed, "Prevention is the best tool for the elimination of sexual harassment." 29 C.F.R. §1604.11(f).

By viewing the harassment from the perspective of a reasonable woman, this standard also strikes a balance between the concerns expressed by the Respondent – that too loose a standard could have a chilling effect on otherwise legitimate conduct – and the concerns of the Petitioner – that the *Rabidue* standard forces a victim into a Catch-22 situation – either quit or wait until the harassment become so debilitating that one must obtain psychological counseling.

B. The second part of the standard assesses liability from the victim's subjective perspective – if the employer knew that this employee was particularly sensitive to certain conduct and did not make reasonable accommodation for that sensitivity.

NELA also advises that the test for determining actionable sex-based harassment include a subjective element.

Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1203 (1989). And, as another study observed, "Comments such as, 'Can't you take a joke?' 'You're being overly sensitive' and 'Lightenup!' are painfully familiar to any woman who has experienced the humiliation of sexual harassment." NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES, A REPORT IN PROGRESS 4 (Nov. 1991).

An employer should, after all, also be held accountable for all foreseeable consequences of its sex-based actions if those consequences are such that they could have been prevented with reasonable accommodation.

In order to make out a case of sex discrimination under this second prong, an employee would have to show that she informed her employer of her particular sensitivity and that her employer ignored her reasonable needs for accommodation. Consider, for example, an employee who informs her employer that, because she was previously victimized by a sexual assault, any acts of familiarity by a male co-worker that include physical contact, regardless of the man's intent, cause her intense psychological injury. The employer's knowledge of that particular sensitivity, if it fails to make reasonable accommodation, could lead to a successful claim of sexual harassment. The same employee could not, however, prevail on a claim for damages if she did not inform her employer that she required special accommodation. Like the person who suffers a temporary disability and asks only that a reasonable accommodation be made for her condition, a woman who has, for example, suffered through the trauma of a sexual assault should not be victimized again by a callous employer or a sexual harasser who targets the weaker and more vulnerable females employees as his victims.

The aim of this subjective portion of the test is not to require employers to respond to hypersensitive individuals who, for example, are offended by the use of any curse words. This part of the standard serves only to ensure that special circumstances, which are previously

communicated to the employer, do not serve as a springboard for inappropriate sex-based harassment.

III. NELA also suggests that its proposed standard be applied in constructive discharge cases, such as the one presented here.

The third significant error made by the lower courts in the instant case was the determination that Teresa Harris could not prevail on her constructive discharge claim because she could not prove that her employer specifically intended to cause her to resign. Magistrate's Report, *supra* (Pet. Writ at A-21).

While not precisely presented in the question posed to the Court, NELA notes that the lower courts' error in this regard presents this Court with an opportunity to conform the disparate holdings of the Circuits on the issue of constructive discharge and announce a standard that, unlike the lower courts' decisions in this case, accords with both the underlying purpose of Title VII and the spirit of this Court's opinion in *Meritor*.

In *Meritor*, this Court recognized that proof of a hostile working environment could establish a Title VII claim. How ironic, then, would it be for this Court to interpret Title VII to say that, although sexual harassment is illegal and the plaintiff has made a sufficient showing that a reasonable woman would have quit after having endured the specific harassment, the harassment is not actionable unless the woman can make the almost impossible showing that her employer wanted her to take this action. A defense that the employer had no intent to cause the woman to leave cannot be squared with a law

that prohibits the conduct and was designed to eliminate it in employment. *Meritor* did not intend to allow complaints only by those who, because of economic necessity or incredible fortitude, continue to function in the workplace despite the harassment. It intended, as Title VII intends, to rid the workplace of the scourge of sex-based harassment.

With the law of constructive discharge – as with the law of hostile working environment generally – any standard that is set from the employer's perspective cannot hope to serve the underlying purpose of Title VII. Concerns about a flood of lawsuits about minor slights are resolved by utilizing a reasonable woman standard in both instances – not by supporting a standard that ignores women altogether.

A. The courts are divided about the proof necessary to demonstrate constructive discharge.

Just as the Circuits are at odds on the appropriate standard by which to judge a hostile work environment, the lower courts also disagree as to the proof required to show a constructive discharge. One-half of the Circuits properly hold that a constructive discharge occurs whenever the complainant's resignation is reasonably caused by and proximate in time to the intolerable working conditions – provided the employer is responsible therefor and a reasonable person in the plaintiff's position would have resigned.[10]

---

[10] *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir.

The remaining Circuits err by requiring an additional element to prove a constructive discharge. These Circuits[11] require evidence that the employer *intended* to force the employee to resign – an onerous burden indeed. As this Court noted in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1963), in fact, direct evidence of an employer's state of mind or intent can be difficult – if not impossible – to obtain. *Id.* at 716.

B. Concerns about frivolous claims of discharge are appropriately resolved by the reasonable woman standard.

The standard currently employed by the Ninth Circuit for analyzing constructive discharge cases properly accords with the aims of Title VII. By contrast, the incredibly stringent standard employed by the Sixth Circuit, among others, improperly – and impermissibly – limits Title VII relief to superhuman plaintiffs. NELA asks this Court to explicitly reject the Sixth Circuit's erroneous additional requirement for proof of constructive discharge.

1987); *Garner v. Wal Mart Stores*, 807 F.2d 1536 (11th Cir. 1987); *Calhoun v. Acme Corp.*, 798 F.2d 559 (1st Cir. 1986); *Goss v. Exxon Office System*, 747 F.2d 885 (3rd Cir. 1984); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984).

[11] *Yates v. AVCO Corp.*, 819 F.2d 630 (6th Cir. 1987); *Derr v. Gulf Oil*, 796 F.2d 340 (10th Cir. 1986); *Bishopp v. Dist. of Columbia*, 788 F.2d 781 (DC Cir. 1986); *Bristow v. Daily Press*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 457 U.S. 1082 (1986); *Martin v. Citibank*, 762 F.2d 212 (2nd Cir. 1985); *Easter v. Jeep Corp.*, 750 F.2d 520 (6th Cir. 1984); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981).

A plaintiff such as Teresa Harris should be able to prove a case of constructive discharge by showing, as she did, that she wrote a resignation letter immediately after Charles Hardy's shocking inquiry in mid-September about whether she had obtained an account by agreeing to allow a man to "bugger" her – and she resigned as soon as she received her commission check for the month of September. A reasonable woman would not continue to work in the face of such a shocking accusation – which was, in this case, made in front of co-workers. (Tr. I at 33, 64).

IV. The government's compelling interest in eradicating sexual harassment from the workplace overcomes any first amendment right that a perpetrator may have to engage in offensive speech.

Because some may argue that a prohibition against sex-based verbal harassment could implicate the First Amendment rights of the harassers, the issue must be addressed. While NELA does not propose that the Court consider this issue in the case at bar, it nonetheless briefly sets forth its views about the First Amendment protection of such speech in the event that the Court decides to address First Amendment concerns.

A. Title VII was designed to prohibit employment discrimination, not to impact speech.

Title VII is addressed to eliminating discrimination in employment – not eliminating speech in employment. Speech thus comes into play only because it, often in concert with conduct, is used as a tool to discriminate

against those protected by the statute. Verbal harassment, however, can be a more virulent form of discrimination than merely quietly determining in the back office not to a promote a woman – a point clearly demonstrated in both *Rabidue* and this case.

Such "terms and conditions" of employment should not be shielded simply because the employer engages in verbal harassment, rather than – or in addition to – physical harassment.

B. The Court's prior decisions confirm that sex-based harassing speech finds no protection in the First Amendment.

Should the Court feel compelled to consider the First Amendment implications of the proposed standard for gender-based discrimination, NELA asks that the Court rely on its previous decisions that have considered First Amendment rights vis-a-vis a claim of sex-based discrimination. In *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), for example, the Court rejected a claim that application of Title VII to consideration of a law firm's partnership decisions would infringe the partners' constitutional rights of expression or association. In rejecting the law firm's claim that the First Amendment insulated its partnership selection activities from scrutiny, the Court referred back to an earlier holding that

> Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

467 U.S. at 78 (*quoting Norwood v. Harrison*, 413 U.S. 455, 470 (1973)). Amicus asks that this holding be reaffirmed with regard to sex-based harassing speech.

Likewise, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court pointed out that infringements on the right to associate may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. In *Roberts*, the U.S. Jaycees sued state officials to prevent enforcement of the Minnesota Human Rights Act, alleging that, by requiring it to accept women as regular members, application of the Act would violate the male members' constitutional rights of free speech and association. In rejecting the First Amendment claims of the U.S. Jaycees, this Court held that

> We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.

468 U.S. at 623. Like the statute at issue in *Roberts*, Title VII is not directed to suppression of ideas, but instead to achieving a compelling state interest – that of eradicating discrimination in employment. Indeed, as this Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971),

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable

group of white employees over other employees.

401 U.S. at 429-30.

C. When employment discrimination assumes the form of sex-based verbal harassment, the statute must prohibit such conduct or see its objectives frustrated.

When unlawful employment discrimination assumes the form, not of a refusal to hire, but of a requirement that women run a gauntlet of humiliating verbal conduct as a condition of continued employment, the statute must regulate some speech, because the aims of the statute simply cannot be achieved through less restrictive means. Indeed, were discriminatory speech not proscribed along with discriminatory conduct, the aims of Title VII would be defeated – as we can see clearly in *Rabidue* and this case. An employer possesses neither the freedom to refuse to promote a woman because of her gender nor the freedom to call her a "cunt" in front of clients. And, no logical view of the bounds of free expression of ideas could support an argument that it would have that right. Conversely, a workplace in which a employer does not possess the freedom to touch an employee in a suggestive manner, but has the ability to ask her in front of her fellow employees whether she has agreed to allow a man to "bugger" her to gain an account, as Charles Hardy asked Teresa Harris, also confounds any reasoned view of First Amendment protections.

As this Court pointed out last term in *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992), because words

can sometimes violate laws directed not against speech but against conduct, a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. 112 S.Ct. at 2546. Such is clearly the case here. Unlike the ordinance at issue in *R.A.V.*, however, which sought to ban speech that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," 112 S.Ct. at 2541, Title VII is not directed to outlawing any speech.

No "official suppression of ideas" (a concern prominently discussed in *R.A.V.*) is involved here, only a concern that employment discrimination be eradicated. Indeed, Title VII does not even mention speech. Title VII does not seek to turn the workplace into a forum tolerating only "politically correct" speech; it seeks only to ensure that the statutory objectives are not frustrated by the inventiveness of the human mind, which can express unlawful discrimination in terms of both conduct and humiliating verbal taunts.

D. The workplace differs substantially from the free marketplace of ideas upon which this Court's First Amendment cases are based.

Finally, in considering the implications of the First Amendment with regard to the proposed standard, amicus also asks this Court to consider the ways in which the workplace differs from the free marketplace of ideas

referred to in this Court's decisions.[12] *See, e.g., Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

In the workplace, a woman does not have the ability to avoid the harasser's message by walking away. Neither does she have the ability to challenge the message at all without risking her job. This economic imperative to work led Congress to pass Title VII in an attempt to level the playing field so that each American could enjoy an equal chance to ply his or her trade.

Most people in our society have, after all, a fundamental need to work to provide the basic necessities for themselves and their families. They cannot afford to risk losing a job by challenging the harassing speech of an employer and they should not be forced to leave a job in order to protect themselves. Title VII, for that reason, seeks to ensure that a woman's right to employment is not saddled with the ludicrous duty to endure harassing comments, such as those made by Charles Hardy to Teresa Harris, or to remain in the ranks of the unemployed.

In the end, the tension here is not between free speech rights and the right to a hostile-free working environment. It is, under the facts of this particular case, a tension between the right of an employer to abuse his employees at whim in violation of statute and the

[12] In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), for example, this Court recognized that the First Amendment rights of public employees were not absolute, but should be balanced against the State's interest as an employer in promoting the efficiency of its public services.

employee's right to perform work without being subjected to such abuse. To hold otherwise is to permit an employer to thwart the government's compelling interest in eradicating discrimination in the workplace with conduct, either verbal or physical, that perpetuates the continued subjugation of women workers.

CONCLUSION

For the reasons stated in this brief, NELA asks this Court to reverse the opinion of the lower court.

Respectfully submitted,

Of Counsel:
William J. Smith
2547 W. Shaw Ave.
Suite 112
Fresno, CA 93711
(209) 221-1484
(209) 221-1487 (fax)

Margaret A. Harris*
Katherine L. Butler
Butler & Harris
3223 Smith, Suite 308
Houston, TX 77006
(713) 526-5677

* *Counsel of Record for National Employment Lawyers Association*

Counsel would like to express their appreciation for the assistance that Phyllis Barker, Kemo Curry, Sheila Owsley, Melvin Richtel, and Elizabeth Tepikian provided in preparing this brief.